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Supreme Court, U.S.
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ALEXANDER L. STEVAS
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NO. 84-953

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE STATE OF FLORIDA,

Petitioner,

vs.

SILVIO P. ZAFRA,

Respondent.

On Petition for a Writ of Certiorari
to the District Court of Appeal of Florida,
Third District

BRIEF OF RESPONDENT IN OPPOSITION TO JURISDICTION

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STATEMENT OF THE CASE

On October 10, 1980, federal Customs Patrol Officers Nesossis, Ogden and Carlin were observing a boat ramp at the Crandon Park Marina at Key Biscayne. As part of their activities, the officers were randomly stopping and boarding vessels for violations of state or federal law. (R.App. 7-8).

A twenty-five foot Bertram boat was being trailered. Respondent Zafra left the boat with another individual, Sanchez, and drove a truck connected to a trailer alongside the pier to trailer the boat. The federal officers observed a state police officer approach the boat in his patrol car. The officer, Public Safety Department Officer Butchko, pulled his car in front of the truck and conversed with Sanchez and Zafra. Butchko shined his flashlight, looked into the boat, walked to the end of the pier and walked back to the truck with Zafra and Sanchez. (R.App. 9: 29-33). When Officer Butchko completed his investigation and walked away, the customs officers decided to board the boat. (R.App. 6-7).

Officers Carlin and Nesossis detained Sanchez and Respondent Zafra while Ogden climbed aboard the boat and commenced a search. Ogden could not see the deck area until he had climbed aboard the boat. On his hands and knees, he searched and felt the deck. He pulled up carpeting. Officer Nesossis put his nose to a hatch and smelled what he thought was marijuana. Ogden and Nesossis left the boat to obtain tools. They returned, removed the hatch, and seized marijuana. (R.App. 9-15).

The officers had received no tip or intelligence information regarding the boat. Their search was conducted pursuant to the random stopping of people in boats. Nothing unusual about the boat, Respondent Zafra, or Sanchez had been observed prior to the stop, detention, and search. The officers possessed no information indicating that the boat

had been outside the territorial waters of the United States. (R.App. 13-17).

The federal authorities refused to prosecute because of the small quantity of marijuana discovered. The federal arresting authorities turned the evidence and suspects over to the State of Florida. (R.App. 79-82).

Respondent Zafra moved to suppress the warrantless seizure of the contraband as having violated his state and federal rights to be free from unreasonable searches and seizures. At the hearing on the motion to suppress, the State of Florida stipulated that the search and seizure could not be justified as having been a "border search." (R.App. 83-4).

Based upon the prosecution's stipulation and the testimony adduced upon deposition and at the hearing, the trial court entered a written order suppressing the evidence. (R.App. 1-2).

The State of Florida appealed this ruling to the District Court of Appeal of Florida, Third District. In a one-paragraph affirmance of the trial court's order of suppression, the Third District rejected the state's argument that the reasonableness requirement of the fourth amendment did not limit customs officers where the stop and subsequent search of the vessel had occurred in [or near] inland waters. There having been no evidence of a border crossing, the Third District followed then binding state and federal interpretations of 19 U.S.C., § 1581(a) requiring the prosecution to prove a prior reasonable suspicion of illegal activity, citing in its affirmance, inter alia: United States v. Villamonte-Marquez, 652 F.2d 481 (5th Cir.1981); United States v. Guillen-Linares, 643 F.2d 1054 (5th Cir. 1981); United States v. D'Antignac, 628 F.2d 428 (5th Cir.1980); Earnest v. State, 293 So.2d 111 (Fla. 1st DCA 1974); and distinguishing United States v. Freeman, 579 F.2d 942 (5th Cir. 1978)(stop and boarding on open waters

document check was permissible; subsequent search based upon probable cause discovered thereafter was legal).

After the Supreme Court of Florida declined the petitioner's request to review the affirmance by the Third District, 418 So.2d 1281 (Fla.1982), the petitioner sought review at the same time that the government sought review of the Fifth Circuit's Villamonte-Marquez decision. This Court reversed the Fifth Circuit in United States v. Villamonte-Marquez, 462 U.S. ___, 103 S.Ct. 2573 (1983), and vacated and remanded the Zafra decision for consideration of the new Villamonte-Marquez doctrine.

The Third District applied Villamonte-Marquez and affirmed once again. State v. Zafra, 444 So.2d 1064 (Fla.3d DCA 1984). Review was sought by the petitioner in the Supreme Court of Florida on essentially the same grounds presented here. The Supreme Court of Florida declined to exercise its discretionary jurisdiction.

SUMMARY OF ARGUMENT

This cause does not present a constitutional issue of national significance warranting review by this Court. Similarly, there is no conflict of decisions sufficient to justify certiorari review. The decision sought to be reviewed is one turning upon a novel set of facts. The issue reached the Florida courts because the federal authorities, who arrested the respondent, deemed the case too insignificant and therefore sought and eventually found a local state police department willing to pursue prosecution. The Florida Supreme Court has declined to review the decision of the lower appellate court, presumably because the cause presents no issue of public importance or constitutional significance. For nearly five years, the petitioner has sought to obtain reversal of the trial court's order of suppression. The indigent respondent urges this Court to bring finality to that order by denying certiorari review.

ARGUMENT

Under Florida law, the District Court of Appeal of Florida, Third District, was required to review the order of suppression in the light most favorable to the prevailing party, State v. Nova, 361 So.2d 411 (Fla.1978), who in this Court is the respondent. Before the Third District, the petitioner did not present a full record. The same incomplete record is presented to this Court. Omitted are the following:

-- the order of the trial court granting the defendant's motion to suppress;

-- the deposition of Customs Patrol Officer Richard Ogden;

-- the deposition of Customs Patrol Officer Richard M. Nesossis;

-- the deposition of Customs Patrol Officer James A. Carlin.

In the state trial court, the parties stipulated to the admission of the aforementioned depositions. Florida follows the traditional rule that the appellant bears the burden of producing a record sufficient to warrant reversal. Without a complete record, a Florida appellate court is obligated to affirm the lower court. Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla.1979). On that basis alone, affirmance by the Third District was warranted.

Despite this procedural error by the petitioner, the Third District found that the record as supplemented by the respondent warranted affirmance for two reasons. First, unlike United States v. Villamonte-Marquez, 462 U.S. ___, 103 S.Ct. 2573 (1983), the record before the Third District established that "the vessel involved was boarded while located on land atop a boat trailer...". State v. Zafra, 444 So.2d 1064, 1065 (Fla.3d DCA 1984).

Second, the Court found that "the boarding and subsequent search of this land-situated vessel was in no sense undertaken as a document inspection." Id. In order

to align itself with the interpretation of Villamonte-Marquez by the United States Court of Appeals for the Eleventh Circuit, the Florida appellate court applied the holding of United States v. Herrera, 711 F.2d 1546 (11th Cir.1983), quoting the following footnote therefrom:

> "In [Villamonte-Marquez], the Supreme Court held that no suspicion is necessary to stop and board a vessel that is located in waters providing ready access to the open sea to conduct a document inspection pursuant to 19 U.S.C. § 1581(a). The Court also made clear that Customs officers are not precluded from using document check authority simply because they suspect drug smuggling or other illegality on board. ___ U.S. at ___, n.3, 103 S.Ct. at 2577 n.3. However, nothing in that opinion suggests that reasonable suspicion is not required when the Customs officers' conduct, objectively assessed, indicates they did not stop and board the vessel to make a document inspection."

Zafra, supra, 444 So.2d at 1065 (original emphasis), quoting 711 F.2d at 1554 n.13.

The Third District found that the emphasized portion applied because "[n]o one was even on the vessel at the time of the boarding; no effort was made by the Customs officer while aboard to inspect vessel documents or examine the manifest; and the entire search was for the admitted purpose of discovering whether marijuana was concealed on the vessel." 444 So.2d at 1065.

The application by the Third District of the Herrera and Villamonte-Marquez decisions flatly refutes the petitioner's first reason for granting the writ, to wit: that the Third District "rejected" Villamonte-Marquez. Brief of Petitioner on Jurisdiction at 14. The tone of the petitioner's brief suggests that the Third District has intentionally failed in its constitutional duties. The petitioner has overstated its case.

It is the petitioner who is "in error", not the Third District, in the contention that "[t]he [Third] District Court's analysis that the customs officers in the case at bar had not authority to conduct the present search because the officers were also looking for narcotics...". Brief of Petitioner at 15; 19. The Third District did not find that

the officers were also searching for drugs. Rather, by their own admissions, they were only searching for drugs.

The petitioner claims that the decision of the Third District is "not only important to Florida, but is also of immediate, critical importance to federal law enforcement authority and to the security and safety of all citizens in virtually all states in this nation where drug trafficking is a problem." Id. at 20. If the case had been so important to the federal government, the federal authorities would not have turned the seized evidence over to the Florida authorities for the admitted reason that the quantity of marijuana seized was too small.

If the petitioner is referring to the precedential value of the state appellate court decision, the claim remains exaggerated. Apparently the decision is not so important to Florida because the Supreme Court of Florida had an opportunity to exercise its jurisdiction and rule in favor of the petitioner but declined to do so. On the ground that the decision of the Third District expressly decided a constitutional issue, the Florida Supreme Court could have reviewed the decision of the Third District. See Jenkins v. State, 385 So.2d 1356 (Fla.1980). But the Florida Supreme Court remains loyal to the proposition that it will exercise such jurisdiction only when "essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice". Id. at 1357.

Moreover, even assuming, arguendo, that a similarly unusual case might again present itself to Florida courts, the petitioner would undoubtedly argue that the decision of the Third District lacked any precedential value by vitue of the Eleventh Circuit's deletion on rehearing of the footnote in the Herrera decision which was quoted and emphasized by the Third District. See 727 F.2d 1016 (11th Cir.1984). The petitioner's argument that the deletion "has had and will have no effect whatsoever upon the present opinion", Brief

of Petitioner at 21 n.3, is an assumption without supporting facts.

The petitioner also suggests that the officers possessed a reasonable suspicion to conduct the search and seizure based upon a "drug profile". Brief of Petitioner at 24. The testimony provided otherwise. The officers stated that the actions of the respondent and the appearance of the boat and trailer were wholly consistent with innocent behavior.

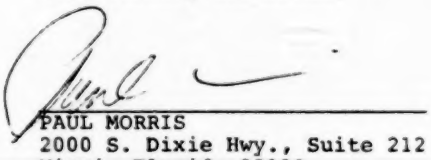
The "good faith" argument advanced by the petitioner was never presented to the trial court and thus, was never properly before any of the Florida appellate courts and should not be considered in this forum.

The petitioner's request for certiorari review should be denied.

CONCLUSION

Based upon the foregoing, the respondent, Silvio Zafra, requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,



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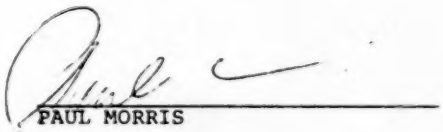
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this 23rd day of April, 1985, to Calvin L. Fox, Counsel for the Petitioner, Assistant Attorney General, Suite 820, 401 N.W. 2nd Avenue, Miami, Florida 33128.



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